IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO. 193 OF 1995

The State of Maharashtra .. Appellant

Vs.

1. Prabhakar @ Popat Hindurao Deshmukh
2. Sambhaji Hindurao Deshmukh
3. Appaso Rajaram Deshmukh
4. Mohan Hindurao Deshmukh
5. Shankar Ramchandra Jadhav
6. Pralhad Dattatraya More
7. Mahadeo Shivaji Bhise .. Respondents (Org.Accd.Nos.1 to 7)

Mr. R.Y. Mirza, APP for Appellant - State.

Respondent No.1 - Original Accused No.1 is reported dead.

Mr. S.R. Borulkar with Mr. Vijay Patil for Respondents-Accused.

CORAM: S.S. PARKAR & ANOOP V. MOHTA, JJ.

Date : March 29 & 30, 2005.

ORAL JUDGMENT (Per S.S. Parkar,J.):

1. This appeal is filed against the order of acquittal of respondents-accused passed by IV Additional Sessions Judge, Satara on 30/1/1995 acquitting all the accused of all the offences, namely, under Sections 302, 307, 326, 325, 324, 323 read with Section 149 of IPC and under Sections 143, 147 and 148 of IPC with which they were charged in Sessions Case No.123 of 1989.

2. Briefly narrated the prosecution case is as follows:-

. All the accused as well as the deceased and the complainants are the residents of village Kusur, Taluka Karad. The incident took place on 18/5/1988 between 8 p.m. to 9 p.m. in front of the house of the complainant, in which Shivaji, the son of P.W.12 Ganpat Krishna Deshmukh @ Desai was murdered while P.W.12 Ganpat, his wife Putlabai P.W.13 and his two sons P.W.9 Vilas and P.W.14 Ananda were injured. The accused persons are also related inter se. Accused nos.1,2 and 4 are brothers while accused no.3 is their cousin. Accused no.5 is the servant of accused no.1. Accused nos.6 and 7 are the friends of accused nos.1 to 4. Prior to the incident in question, Grampanchayat Elections were held in the village in which accused no.2 Sambhaji had contested. In that election P.W.12 Ganpat and his sons canvassed against accused no.2 and the members of his panel who were defeated and, therefore, accused no.2 and other accused were holding grudge against P.W.12 Ganpat and members of his family. P.W.12 Ganpat had also lodged N.C. complaint against the accused with the police

alleging danger to him from the accused persons. The prosecution has also alleged that accused no.2 Sambhaji was demanding three gunthas of land out of the land belonging to P.W.12 Ganpat and his sons without consideration. The said land is situated in front of the Grampanchayat Office in the said village. P.W.12 Ganpat having refused to give the said land to accused no.2, the latter is said to have borne grudge against Ganpat on that ground also. On the date of the incident at about 6 p.m. in the evening deceased Shivaji was assaulted by accused persons near Jotiba Temple which is near his house. At that time accused persons caught hold of him and tore his banian. P.W. 13 Putlabai, the mother of deceased Shivaji, rushed to that place and brought Shivaji back home. Thereafter on that night when Shivaji was in the courtyard of his house near the cattle-shed, the accused persons who were armed with weapons like sword, axes and sticks assaulted Shivaji. The members of his family i.e. his father P.W.12 and his mother P.W.13 went out to rescue him, but they were also assaulted by the accused persons. At that time another son by name Ananda P.W.14 came there. He was also assaulted by the accused persons. The last person from the family of complainant, who arrived on the scene, was P.W.9 Vilas. He had been to Karad that day. When he

returned the assault was going on. He was also assaulted by the accused persons. At that time one Adhikram Kadam, for whom the complainant's family had worked during previous Grampanchayat Election, came there in his jeep. Seeing him, all the accused persons ran away from the place of incident. In that jeep Adhikram took P.W.12 Ganpat and his son Vilas P.W.9 to Krishna Charitable Hospital at Karad. Both of them being injured seriously were admitted to the hospital and were indoor patients for long time for treatment of the injuries received by them in that incident. P.W.13 Putlabai, the mother of deceased and Ananda P.W.14 had remained in the house as they were not seriously injured.

3. The constable attached to the said hospital went and informed P.S.I. Chougule, the Investigating Officer, at his residence that there was fight in village Kusur and two of the injured persons were brought and admitted to Krishna Charitable Hospital, Karad. The P.S.I. then went to the Karad Police Station and from there went to the said hospital accompanied by other police staff. In the hospital he saw P.W. 9 Vilas and P.W.12 Ganpat admitted in the hospital. P.S.I. recorded the statement of P.W.9 Vilas in the presence of Dr. Kadam who was attending

to him. As there was injury on the hand of Vilas, his thumb impression was obtained on his statement, instead of his signature, on which the endorsement of Dr. Kadam was also obtained. That statement is produced at Exh.71 on record on the basis of which crime was registered under C.R. No.150/88 for offences under Sections 143, 147, 148, 149 and 307 of IPC. Thereafter P.S.I. went to village Kusur same night at about 1 a.m. Nobody was found in the house of the complainant, nor the accused were traced. He, therefore, returned to the police station at about 4.30 a.m. By that time P.W.14 Ananda, the brother of the deceased had reached the police station. P.S.I. thereafter again came back to village Kusur along with Ananda and drew spot panchanama which is at Exh.33. From the place of incident blood stained stick and earth smeared with blood so also blood stained stones were attached under spot panchanama. At that time the dead body of Shivaji was found in the bathroom in the cattle shed in front of the house of the deceased. Inquest panchanama was drawn on the dead body which is Exh.27. The dead body was sent for post mortem examination along with constable More P.W. 16. The offence under Section 302 of IPC was also added to the crime after the recovery of dead body of Shivaji. Thereafter the statements of mother of the deceased

P.W.13 Putlabai and brother of deceased P.W.14 Ananda were recorded so also of P.W.12 Ganpat, the father of the deceased. Same day, during search of the house of accused nos.1,2 and 4, a bamboo stick (Article 9) having blood stains was found from under the heap of woods just out side the house, which was attached under panchanama Exh.35. On that day complaint was lodged by one Shivaji More, the brother of accused no.6 at Kole outpost which was passed on to Karad Police Station. The crime was registered on the basis of that complaint under C.R. No.151/88. That complaint was filed against P.W.12 and his sons Vilas P.W.9 and Ananda P.W.14 and deceased Shivaji and others for offence of rioting and assault near Jotiba Temple. On 20/5/1988 the blood stained clothes of P.W. 12 Ganpat and P.W. 9 Vilas were attached under seizure panchanamas Exhs. 23 and 24. Though by morning of 19/5/1988 the names of all the accused were disclosed in the statements of the witnesses and the search was made, none of the accused were available for arrest until 26/5/1988.

4. On 26/5/1988 P.S.I. arrested accused no.2 Sambhaji and accused no.3 Appaso in village Tulsan, Taluka Karad. Accused nos.5,6 and 7 surrendered on 1/6/1988. Accused no.1, who had obtained anticipatory

bail was formally shown arrested on 7/7/1988. Similarly accused no.4 who had also obtained anticipatory bail was formally shown arrested on 16/7/1988.

5. After his arrest on 26/5/1988, accused no.2 had shown his willingness to produce the axe and sword hidden by him under the Tamarind tree. Accordingly the memorandum of his statement was prepared at Exh.37 and the axe and sword recovered at his instance were attached under panchanama Exh.37-A. The axe is muddemal article no.18 and sword is muddemal article no.19. After accused no.5 Shankar surrendered at the police station on 1/6/1988, he volunteered on 4/6/1988 to produce an axe and a stick hidden by him in his bamboo shrubs. Accordingly memorandum panchanama Exh.40 was drawn and axe muddemal article no.20 and a stick muddemal article no.21 recovered at the instance of accused no.5 were seized under panchanama Exh.40-A. The muddemal articles as well as the clothes of the deceased Shivaji were sent to the office of C.A. for examination and reports were obtained about blood stains found on them. After completion of the investigation, charge-sheet was filed on 3/10/1988 in the court of JMFC, Karad and the case was committed to the Sessions Court.

6. In the Sessions Court charges were framed on 25/2/1994 against all the respondents-accused, who were seven in number, for offences under Sections 143, 147, 148 and under Sections 302, 307, 326, 325, 324, 323 read with Section 149 of IPC. Alternative charges were also framed against all the accused persons for offences under Sections 302, 307, 326, 325, 324 and 323 read with Section 34 of IPC. Thus 15 charges were framed against all the respondents-accused vide Exh.9. All the accused pleaded not guilty to the charges and, therefore, prosecution examined 17 witnesses to substantiate the charges levelled against the accused. The injured eye witnesses are P.W.9 Vilas, the brother of deceased, P.W.12 Ganpat, the father of the deceased, P.W.13 Putlabai, the mother of the deceased and P.W.14 Ananda, the brother of the deceased. P.W.1 is Maruti Desai, who acted as panch for inquest. P.W.2 is Baburao Chavan, who had drawn the map of scene of offence. P.Ws. 3 to 8, who had acted as panchas for spot and discovery panchanamas had turned hostile and did not support the prosecution case. P.W.10 is Dr. H.R. Tata who had examined P.W. 9 Vilas. P.W.11 is Dr. Madhukar Salunkhe who had performed post mortem examination on the dead body of Shivaji and examined P.W.13 Putlabai and P.W. 14

Ananda. P.W. 15 is Dr. Ravindra Gunaki who had examined P.W.12 Ganpat. P.W. 16 is constable Bhalchandra More, who had taken the dead body of Shivaji to the Cottage Hospital, Karad for post mortem examination and also taken possession of the clothes of the dead body which were seized under seizure panchanama Exh.22. Lastly, P.W. 17 is P.S.I. Vijay Chougule, who investigated the case. The defence of the accused is of total denial. The accused have examined one defence witness Kalavati Bhise. From the cross-examination of the prosecution witnesses and the evidence of the defence witness, the defence of the accused appears to be that a mob of 50 persons had gathered near the house of the deceased and had resorted to violence, in the course of which the deceased and the prosecution witnesses had received injuries.

7. The Additional Sessions Judge by the impugned judgment and order has acquitted all the respondents-accused, who were tried before him, of all the offences on the ground of discrepancy in the evidence of prosecution witnesses, including the offences in respect of the assault made on the individual witnesses who were injured. The said judgment and order of acquittal recorded by the trial

court is under challenge in this appeal filed by the State.

8. We heard the learned APP and the defence advocate at length after going through the evidence of the witnesses and perusing the reasoning of the trial court. On behalf of the State it was argued that there is cogent and reliable evidence of the witnesses who were themselves injured at the time of the incident which took place in front of their house and the said evidence is corroborated by the medical evidence and recovery evidence which cannot be ignored and, therefore, the acquittal of the accused was illegal. On behalf of the defence it was argued that there are discrepancies in the evidence of witnesses as regards the time of the incident and the witnesses do not appear to have seen the assault on deceased Shivaji as they had not known the whereabouts of deceased Shivaji, whose body was traced from the bathroom situated in the cattle shed after the police went there following morning to draw the spot panchanama. It was, therefore, submitted that the accused were rightly acquitted.

9. Apart from the fact that panch witnesses had turned hostile at the time of trial of this case, even

P.W.9 Vilas, the brother of the deceased, who himself was seriously injured, had also surprisingly turned hostile though the crime was registered on the basis of his statement recorded after he was admitted in the hospital on the night of the incident and he had named only those accused who had assaulted him. According to his own deposition he was admitted to Krishna Hospital at 9.30 p.m. on the night of the incident as he had received injuries. According to him he had received two injuries on his right hand and two injuries on his head and one injury on his left hand and was indoor patient for 27 days in that hospital. He had been to Karad in the afternoon of 18/5/1988 and returned about 7.30 p.m. According to his hostile version given in the court, while returning from Karad when he was near the threshold of his house, somebody hit stick on his head as a result of which he fell down and became unconscious and regained consciousness in the hospital. He has also deposed that his father Ganpat was also injured on that day and he had also been admitted to the hospital. Thereafter the police came to the hospital to whom he narrated the incident which was recorded by the police. But he denied that the complaint was read over to him and, therefore, he was declared hostile. He has also denied certain portions from the complaint read out to him in the

court. In the cross-examination by the P.P. it was put to him that he was giving false evidence as he apprehended that the accused persons would create obstacles in the marriage of his daughter which was arranged that time. His statement on the basis of which crime was registered is proved by I.O. P.S.I. Chougule and produced on record at Exh.71. In the said complaint he has attributed assault on his right hand and left hand and his head to accused no.1 with a sword and to accused no.2 with stick. The said complaint also mentions that his brother Anandrao P.W.14 had contested the election of the society about a year ago and since that time there was strained relationship between the accused and his family in respect of which his father had given complaint and because of that accused nos.1,2,3 and other 15-20 persons had assaulted him and his father with sword and had attempted to kill him.

10. This witness who had turned hostile was examined by Dr. H.R. Tata P.W.10. Dr. Tata was at the relevant time working as Medical Director in Krishna Hospital, Karad. According to him on 18/5/1988 P.W. 9 Vilas was admitted in that hospital and he had examined him and given treatment. He has

produced original case papers (Exhs.49 & 49-A) in the court. He had noticed following external injuries on the person of P.W.9 Vilas:-

> (1) C.L.W. on right forearm, bone deep, cutting all the muscles, radial ulnar arter 4 and ulna nerves 15 x 10" C.M.
>
> (2) C.L.W. on left hand at metacarp totha lan geal joint.
>
> (3) C.L.W. scalp occipital 6" x 2" C.M. right parietal 4 x 4 c.m. left parietal 8 c.m. x 2 c.m.

. The doctor has also proved the case papers and the injury certificate (Exh.50) dated 16/3/1994 issued by Dr. Shaha who was working under him and has deposed that this witness was admitted in the hospital on 18/5/1988 and discharged on 14/6/1988. According to Medical Officer injury no.1 might have been caused by sharp and cutting instrument. Injury no.2 was also possible by hard and sharp cutting weapon and injury no.3 could be caused by hard and blunt object. Doctor has further opined that injury no.1 was dangerous to human life. This injured witness had undergone surgical treatment in that hospital.

11. No doubt this witness was declared hostile but it is well settled that the portion of the evidence of even hostile witness can be relied by the court which supports the prosecution case and is otherwise reliable. He has deposed that he was injured on 18/5/1988 when he returned from Karad in the evening at about 7.30 p.m. as he was assaulted by somebody on his head with stick near the threshold of his house as a result of which he fell on the ground and that he was admitted to the Krishna Hospital at about 9.30 p.m. that very night as he had received injuries. He has also admitted that he had received two injuries on his right hand, two injuries on his head and one injury on his left hand and was indoor patient for about 27 days in the said hospital. He has also admitted that his father Ganpat i.e. P.W.12 was also injured on that day and, therefore, he was also admitted in the same hospital and that police came there on the same night to whom he narrated the incident which was recorded by the police, on which his thumb impression was obtained. Thus he does corroborate the prosecution case that incident of assault had taken place on the night of 18/5/1988 just outside his house in which he was injured while he was near the threshold of his house and because of the injuries suffered by him he was admitted to the

hospital same night where his father was also admitted for his injuries.

12. On behalf of the defence it is argued that the complaint Exh.71 lodged by this witness is only in respect of the assault on him in which all the accused were not named but the other accused were named subsequently after the recovery of the dead body of Shivaji. The witness not having corroborated his statement Exh.71 on the basis of which crime was registered, his statement cannot be given much importance. But the evidence of other witnesses shows that he had come when the assault was almost over and when he came he was also assaulted and, therefore, he was taken in the jeep of Adhikram along with his father P.W.12 Ganpat. The crime was registered at that time for the offence of rioting and for offence of attempt to murder under Section 307 of IPC because of the serious injuries received by P.W.9 Vilas and his father P.W.12 Ganpat. P.W.12 was present at the place of incident from the beginning who had witnessed the assault on deceased as well as his wife and sons. Police, who were not aware about the actual incident in question, when informed about the admission of two patients from village Kusur, seeing injured Vilas

P.W.9 in a position to give statement, recorded his statement and the crime was registered. P.W. 17 P.S.I. Chougule was not aware that time that other members of the family were also assaulted in that incident as he had not interrogated or recorded the statement of P.W.12 Ganpat that night. P.W.9 gave his statement to the extent of his knowledge about the incident. He had arrived at the scene at the fag end of the incident of assault on deceased and other witnesses. Neither P.W.9 was aware about the assault on the deceased and other members of the family nor the police had any occasion or source to know about the same. P.S.I. had no reason to know that P.W. 12 Ganpat was knowing about the assault on deceased and other members of the family, otherwise P.S.I. would not have failed to record his statement. In the statement of P.W.9 there was no indication of the other members of the family having been assaulted or injured except his father and himself. It was pursuant to this complaint that I.O. went to the place of offence that very night at about 1.30 a.m. but since no one was there, not even the three accused who were named in the statement of P.W.9, he went back to the police station at about 4.30 a.m. By that time P.W.14 had reached the police station and, therefore, P.S.I. again went to the place of offence along with

him same morning and drew spot panchanama. Naturally, before drawing the spot panchanama police went around the house inside as well as outside the house and that is how the dead body of Shivaji was traced in the bathroom of the cattle shed which was adjoining to the residential house of the complainant party.

13. On behalf of the defence it is contended that witnesses must not have seen the assault on Shivaji and the witnesses have spoken about the assault on Shivaji only because his dead body was found. There is no substance in the said contention. As observed earlier, the witnesses have said that they saw Shivaji being assaulted by the accused with weapons like axe, sword and stick and, therefore, he ran towards bathroom. Though the witnesses had seen Shivaji running away, may be towards bathroom, but the witnesses did not have the reason to know that Shivaji had succumbed to his injuries and must be lying dead in the bathroom. When they saw him running away because of the assault on him they might have thought that he must have escaped from the place of incident. Immediately after the incident the family had split up as P.W. 12 Ganpat and P.W. 9 Vilas were taken to the hospital, while Putlabai, P.W.13 remained in the house though she was also injured. P.W.14 Ananda had gone

to the police station that very night which is at some distance from village Kusur. If the statement of P.W. 12 Ganpat had been recorded that very night or of some other eye witness, the witnesses would have certainly stated about the assault on Shivaji even before his dead body was traced. The statement of only P.W.9 was recorded for the purpose of registering crime, who was obviously not aware about the assault on Shivaji as the witness had arrived at the scene after Shivaji had tried to escape by running away from the place of the incident after he was assaulted.

14. It cannot be forgotten that the incident had started with assault on Shivaji. The incident which took place near the house of the deceased in the night was preceded by earlier incident which took place between 5 p.m. and 6 p.m. on that very day near the Jotiba Temple when the mother of deceased Shivaji had rescued him and brought him to their residence. When Shivaji was leaving the house to attend his shop after taking meals at about 8 p.m. in the night he was again assaulted by the accused near his own house. That time his parents went out to rescue him but they were also assaulted. P.W. 13 the mother having received injury near her eye and father having been seriously injured, who had to be hospitalised for a

period of about 2 months, could not have known where Shivaji had gone. When the incident of assault had started with the assault on Shivaji and when the members of his family intervened they were also assaulted by the accused persons, the assault on Shivaji cannot be separated from the assault on his parents and brothers. Therefore, the argument that the assault on Shivaji was not witnessed by any of the injured eye witnesses is without any substance.

15. It was argued that the statements of parents and other brother of Shivaji having been recorded after the recovery of the dead body there was mention of assault on Shivaji by the other witnesses. That argument is too far-fetched and cannot be accepted for the simple reason that in the evening and night Shivaji being main target of assault and the other witnesses having been assaulted only because they intervened when Shivaji was being assaulted, the assault on Shivaji cannot be separated from the assault on other members of the family. The assault having taken place on Shivaji and the other witnesses at the same time and place, the injured eye witnesses who are none other than the close relations of deceased Shivaji residing in the same house, the witnesses were the most natural witnesses. Simply

because the witnesses are close relations to the deceased their evidence cannot be disbelieved as the close relations are not likely to implicate accused falsely leaving the real assailants free.

16. P.W. 12 Ganpat, the father of deceased Shivaji has deposed that on 18/5/1988 i.e. the day of the incident he had returned to his house at about 8 p.m. That time all the accused were standing in front of his house. Seeing the danger he went to his house from different way. That time he was told by Shivaji that he was assaulted between 5 p.m. and 6 p.m. on that day by the accused persons. When Shivaji went in the courtyard of their house, all the accused persons assaulted him. He was assaulted by accused no.1 with sword on his head, by accused nos.4 and 5 with axes while accused nos.2 and 3 assaulted him with sticks, as a result of which Shivaji fell down and thereafter accused no.6 held this witness by his waist and accused no.1 assaulted him with sword on his head. Accused nos.4 and 5 assaulted him with axes. That time his wife Putlabai P.W. 13 and son Ananda P.W. 14 came out of their house and they were also assaulted by the accused persons. When one Adhikram Kadam arrived there in the jeep, he and his son were taken to the hospital. This witness was admitted to

the hospital same night but his statement was recorded on the following morning when he had attributed assault on himself as well as Shivaji and other members of the family to the accused.

17. P.W. 12 was examined by P.W. 15 Dr. Gunaki. He has deposed that P.W.12 was admitted to the hospital on 18/5/1988 and this doctor along with Dr.Patange had operated on the wounds of P.W. 12. He had received following five external injuries on his person:-

> (1) C.L.W. on medial aspect of left wrist starting from hypothenar eminece extending upto to 2 inch above the wrist joint. There was another wound crossing this wound extending from dorsum of wrist joint upto the first linear wound. It was six inches in length. With ulnar an nerves and artery found cut. The lower end of ulna was fractured and communicated. All extern sar tendens were cut.
>
> (2) C.L.W. extending from medial end of spine of the scapula along with spins extending downwards over the shoulder upto the upper third of left arm. The shoulder joint was opened oposteriorly. The delted muscle was found cut. The muscles tratezious supra spinatus intrspinature found cut.
>
> (3) Linear wound, anterior aspect of right shoulder, 3 length to skin deep.
>
> (4) Semi circular wound on the posterio aspect of left shoulder, 3 inch long skin deep.

(5) C.L.W. on face on right side 6 inch long extending from meddle of nose upto angle of mandible. Bone deep, maxilary sinus opened.

. The above injuries are stated to be possible by use of sharp weapon. P.W. 12 was indoor patient from 18/5/1988 to 9/7/1988 i.e. for a period of one month and three weeks. As per the medical papers (Exh.66) produced from the hospital by Dr. Gunaki the history of stab wounds inflicted on him by sword was given by the patient.

18. Then there is evidence of P.W. 13 Putlabai, the mother of deceased Shivaji. According to her evidence incident had taken place after 8 p.m. when Shivaji was going to his shop after taking dinner. At that time accused nos.1,3,5 and 6 had held him and torn his banian which was on his person. She, therefore, went and brought him back to the house. Thereafter all the accused came there and assaulted her son Shivaji and her husband P.W.12 Ganpat. She has deposed that because of the assault Shivaji ran towards bathroom. It was accused no.5 who had assaulted this witness near her right eye with an axe. She was examined by Dr. Salunkhe P.W.11 who was attached to Cottage Hospital, Karad. According to Dr.

Salunkhe she had received following two injuries on her person:-

(1) C.L.W., contusion on right maxilla 2"x2" inch over central par 1/2 x 1/4 x 1/4".

(2) Tenderness on left arm.

. According to the doctor those injuries could have been caused by hard and blunt object.

19. The next injured eye witness is P.W. 14 Ananda, the brother of deceased Shivaji. He has also spoken about the quarrel of accused no.6 and his brother Shivaji More with deceased Shivaji prior to the incident on the same day in respect of which accused no.6, brother of Shivaji More, had filed complaint against them in the police station. When he returned from his work his brother was standing in the courtyard of their house. He was told by his mother about the earlier incident. Soon accused came running towards their house from the temple armed with weapons like sword, axes and sticks and assaulted Shivaji, this witness and his parents. According to him accused no.1 armed with sword, accused nos.4 and 5 armed with axes and accused nos.2 and 3 armed with

sticks along with accused nos.6 and 7 started assaulting his brother Shivaji. Shivaji ran away from that place towards cattle shed. When his father came out of the house he was assaulted by accused no.1. His mother was assaulted by accused no.5 and she became unconscious. Later on his brother P.W.9 Vilas came and he was also assaulted by accused nos.1,2 and 3 with sword and sticks. He has deposed that accused no.5 assaulted him with butt-end of the axe on his head. Thereafter he went towards Harijan Vasti of that village and from there he went to Karad Dhebewadi road at Kole village stop and thereafter he went to Gharewadi and then he boarded a truck and went to Karad Taluka Police Station at about 4.30 a.m. and narrated the incident to the police officer who was present there. P.S.I. and other police staff accompanied him to go to the place of incident.

20. This witness was examined by Dr. Salunkhe P.W.11 on 19/5/1988. He was examined at about 1.45 p.m. on that day when following four external injuries were noticed on his person:-

(1) C.L.W. at the centre of the scalp admeasuring 1" x 1 x 1/4 inch, fresh clots.

(2) Contusion on left scapula transverse 5 x 6

reddish in colour.

(3) Contusion on left shoulder, 4x2".

(4) Abrasion to right hand, dorsally 8x2" contusions.

. According to the Medical Officer the above injuries could be caused by hard and blunt object. Doctor has produced his case papers at Exhs.53 and 54 in which the history of assault on 18/5/1988 at about 10 p.m. has been mentioned. This witness was an O.P.D. patient.

21. Thus in the incident in question apart from the assault on deceased, four members of his own family were assaulted and two of them had received serious injuries because of which P.W.9 Vilas, brother of deceased Shivaji had to be hospitalised for a period of about 27 days and P.W.12 Ganpat, father of deceased Shivaji for a period of about one month and three weeks.

22. At this stage it would be convenient to consider the injuries received by deceased Shivaji. Doctor who conducted post mortem on the dead body of Shivaji is again Dr. Salunkhe P.W.11 who had examined

PWs.13 and 14 for their injuries. As per the evidence of Dr. Salunkhe P.W.11 the post mortem on the dead body of Shivaji was conducted by him between 1 p.m. and 2 p.m. on 19/5/1988 when following six external injuries were noticed on the various parts of the dead body :-

> (1) Chop wounds on left side of skull, vertex - anteric posteriorily, 4 in numbers and 1 A, B, 1-c and 1 D in diagram shown in column No.17 of post mortem notes.
>
> Injury No.1 A admeasured 7 inches x 1 inch x 3 inches.
>
> Injury No.1 B admeasures 5 inches 1 x 3 inches.
>
> Injury 1 C admeasures 7 inches x 2 x 3 inch.
>
> Injury No.1/D admeasures 3 inches x 1/2 inch x 1/2 inch.
>
> Injuries Nos.1 A, B and C causing fracture and cutting bone and demaging the frontal lobe and left hemsphere.
>
> (2) Stab wound, eliptical cutting left lung 2 inches left to T 4, admeasuring 3 inches x 2 inches x chest deep (going into the cavity).
>
> (3) Superficial cut found right scapula 2 x 1 x 1 inches.
>
> (4) Abrasion 1" medial to No.2 injury, 6 x 14 inch.
>
> (5) Cut wound on left wrist, cutting redius and ulna through joint, 1x2x2 inches.
>
> (6) Stab injury on left chest 7th rib, oblique down, 2 x 2 inches x chest deep, oblique down, sharp cutting instrument, age within 24 hours

of all injuries. All these injuries were ante mortem.

. On internal examination following injuries were noticed, which are in the nature of haematoma, fractures of frontal and parietal bones and laceration of the brain:

(1) Injury and haematoma was found to left hemisphere measuring 8 x 8 inches.

(2) There was cut fracture to the frontal bone and left parietal and to part of occipital bone below the injury No.1 shown in column No.17 i.e. the skull fracture corresponds to external injury No.1 shown in column No.17.

(3) There was laceration and cut of total left hemisphere of the brain. The brain protruding out through the wound. This wound also again correspond to external injury No.1.

(4) There was left cut fracture of second and third ribs anterioraly and posteriorrly below injury No. x to lung.

(5) There was cut at middle lobe of left lung admeasuring 3 x 2 inches. This injury correspond to external injury No.6.

(6) There was injury to perricardian of heart. Perricardian was torn admeasuring 2 x 1 inch. The pulmonary artery was cut. Right Atrium was also cut admeasuring 1 inch Aunical measn atrium.

23. It is pertinent to mention that stomach of deceased Shivaji contained undigested food particles

(rice, dal etc.) and the time of death has been stated to be about 1 to 2 hours after the last meal. This corroborates the evidence of P.W.13 Putlabai, the mother of deceased Shivaji, that about 8 p.m. Shivaji took his meal and wanted to go to his shop when he was assaulted. The cause of death of Shivaji has been given as due to skull injury with heart injury. According to the Medical Officer external injury no.1 could be caused by sharp cutting weapons like axe, butcher's knife, chopper or heavy sword. External injury no.2 could be caused by a pointed and single edged end of sword. Injury no.6 was possible with the weapon like sword. External injury nos.3 and 5 were possible by use of sharp and cutting object like knife, sword and axe. The doctor has opined that all the external injuries were cumulatively sufficient for the death in the ordinary course of nature. He has further opined that even external injury no.1 or external injury no.6 along with their corresponding internal injuries were also sufficient to cause death in the ordinary course of nature.

24. In the evidence of all the Medical Officers examined for the injuries of deceased Shivaji and the prosecution witnesses the common case put to them on behalf of the defence is that injuries of some of the

injured were possible by stones with a view to support the defence case that mob of about 50 persons had collected near the house of deceased and were pelting stones and the deceased and the witnesses must have been injured at the hands of the mob who were pelting stones. First of all the stones had been allegedly pelted on the house of the complainant party. It is not conceivable that the prosecution witnesses and the deceased would continue to remain outside their house until all of them were seriously injured because of pelting of the stones on them by the mob collected there. Moreover, even if it is assumed that all the injuries received by all the injured persons, including the deceased, were possible because of pelting of the stones, the stones which could cause incised wound were required to be sharp edged stones as per the case put up to the doctor on behalf of the defence. That is only one of the several possibilities of receiving injuries which required the fulfilment of two conditions. Firstly stones used against all the injured persons were sharp edged stones, which is next to impossible and secondly that all the witnesses continued to remain outside their house and did not avail of the protection available to them of their own house until they received serious injuries resulting in fractures and cut injuries which

are normally possible with the use of weapons like sword and axes. The defence taken by the accused is thus impossible to believe and, therefore, acceptance of such defence as possible by the trial court is perverse.

25. The fact that the injured witnesses have mentioned the names of the accused as the persons who had assaulted the witnesses themselves and the deceased in their statements recorded on the same night or in the following morning ensures that the accused were not falsely implicated by the witnesses on the ground of enmity as alleged. It is difficult to appreciate the defence suggestion that witnesses had named accused persons falsely due to previous enmity in respect of assault on them and the murderous attack on Shivaji. No doubt there are some discrepancies in the evidence of eye witnesses but that is likely when the assault had taken place in the night time on the witnesses themselves who cannot be expected to minutely observe the assault on different persons by different accused as observers. In a case of this type it is natural that the witnesses will not see assault by each and every accused on every injured witness and, therefore, omissions in the police

statement are quite natural. In assault of this kind where seven accused assaulted about five persons, the witnesses are not expected to give particulars of the assaults by different accused on different injured persons and, therefore, there should be no hesitation in believing the witnesses. As a matter of fact, it is difficult to disbelieve injured witnesses when they implicate the accused persons as the persons who had assaulted the deceased and the witnesses with weapons which is corroborated in material particulars by medical evidence.

26. Reliance by the defence on the evidence of Defence Witness Kalavati is absolutely misplaced. It is argued that Kalavati's statement was recorded by the police yet she was kept back and, therefore, defence had to examine her as a Defence Witness. It is also argued that statements of two more neighbours Yashodhabai and Vatsalabai from the locality were recorded but they were also kept back by the prosecution and, therefore, adverse inference should be drawn against the prosecution. Firstly, the prosecution is not bound to examine each and every person whose statement was recorded by the police and burden the record unless it is relevant. Normally, the witnesses to the assault are supposed to be

examined. Apart from the fact that in a matter of this kind where one person was murdered the neighbours or other persons would not come forward to give evidence against the accused and run risk of their own life or incur the wrath of the accused persons with whom they have to live in the same locality. Defence Witness Kalavati has deposed that she heard the hue and cry on the day of the incident at about 8.30 p.m. from the side of Jotiba Temple. When she came out of her house, she saw the quarrel was going on near the temple. About 50 persons had gathered near the temple. In those persons she had seen P.Ws. 9, 12, 13 and 14. She had also seen P.W.13 Putlabai taking her son deceased Shivaji towards her house and P.W.12 Ganpat and his sons returning to their house. Thereafter when she was sitting in front of her house she had seen Shivaji standing in the courtyard of his house and within 15 minutes many persons went running towards the house of Ganpat P.W. 12. She also states about the scuffle having taken place between those persons. She also saw sticks, axes and choppers in the hands of the persons who had collected there and throwing of stones. But surprisingly what she could not see was only the presence of the accused persons. Thus, she has corroborated the testimony of the prosecution witnesses except that she conveniently

does not see any of the accused persons there. In other words, according to her the incident had taken place in the manner deposed to by the prosecution witnesses but the deceased and prosecution witnesses were assaulted by the persons whom she did not recognise or identify. It is very pertinent to note that while she points out the presence of deceased and all the injured prosecution witnesses but she cannot name a single person who had assaulted these injured persons. One can understand if she were to name some other persons as the assailants who had assaulted or between whom the scuffle with deceased Shivaji or prosecution winteeses was going on. The only inference the court is left to draw is that Kalavati had come to defend the accused persons. She had seen the presence of prosecution witnesses and the scuffle, but does not know with whom the prosecution witnesses had scuffle unless they had scuffle among themselves and had assaulted one another.

27. In this respect on behalf of the prosecution judgements of the Supreme Court were cited before the trial court, but the trial court instead of following the ratio of those decisions has only made a reference to them and failed to apply them though they were

quite relevant in the facts of this case. For instance, the prosecution had cited the case of Daryasing Vs. State of Punjab reported in **1965 (1) Cri.L.J. 350**, in which it was held that the evidence of witnesses who were related to the victim should be closely scrutinized and their evidence can be accepted without corroboration. In this case the witnesses though relations of the deceased were themselves victims of assault and were injured eye witnesses whose evidence cannot be brushed aside casually on account of minor discrepancies. The trial court surprisingly had expected independent witnesses to come forward in the instant case on the ground that the dispute was between two families and not in the whole village nor the whole village was divided into two factions. To express such view by the trial court in the teeth of the above observations of the Supreme Court is tantamount to ignoring the ground realities of life and also to be unable to properly appreciate the ratio of the decision of the Supreme Court in the aforesaid case.

28. Coming to the evidence of Defence Witness and non examination of Yashodhabai and Vatsalabai whose statements were recorded, what we find is that the evidence of Defence Witness far from advancing the

defence of the accused has to a large extent supported and corroborated the prosecution case. From her deposition it is clear that she had not witnessed the actual assault and, therefore, the prosecution had rightly not examined her as a prosecution witness. On behalf of the accused it is not pointed out that there was anything in the statement of Yashodhabai or Vatsalabai which would have advanced the case of the prosecution or supported the defence. Nor her evidence would been helpful in throwing light on the incident of assault on deceased and the witnesses. If there had been anything in their statements which would have contradicted the case of the prosecution or supported the defence in any way, surely the defence would not have desisted from examining them as defence witnesses. The criticism, therefore, that independent witnesses have not been examined by the prosecution is without any substance and is levelled for the sake of argument.

29. The trial court while appreciating the evidence of injured eye witnesses has lost sight of the fact that while the incident in question took place in May 1988 and the evidence was being given by the witnesses in the court in the year 1995 and, therefore, there are bound to be minor discrepancies

as the witnesses were not expected to remember minute details after the passage of about seven years' period. The court cannot forget that the witnesses are rustic agriculturists.

30. Much ado has been made on behalf of the defence about the depositions of some of the witnesses stating that after the assault on Shivaji they had seen Shivaji running away towards the bathroom. May be that such statement may have been made by the witnesses because the dead body was traced in the bathroom of cattle shed which was adjoining to their residential house. It was argued on behalf of the defence that if they had seen Shivaji going towards the bathroom they should have gone to search him in the bathroom and need not have waited till next morning when the police arrived at the place for investigation.

31. As pointed out earlier, the family members of the deceased were split up immediately after the incident. Father of the deceased and the brother of the deceased who were injured were taken to the hospital in the jeep of Adhikram Kadam at a time when accused were still there on the scene but had run away

after arrival of jeep of Adhikram. P.W. 13 Putlabai, the mother of deceased, had remained in the house and P.W. 14 Ananda had left home and gone to the police station in the midnight. As per his own deposition he had first run away from the place of incident towards Harijan Vasti of that village for safety. Thereafter he went near Karad Dhebewadi road at Kole village stop and thereafter went to Gharewadi. Then he took a lift in a truck and went to Karad Taluka Police Station. All the witnesses who had seen the deceased, being assaulted and running away for his life, must be under the impression that he must have escaped somewhere. If they had seen Shivaji running away either towards cattle shed or towards bathroom which was in the cattle shed, they must not have expected him to be so badly injured that he would succumb to his injuries in the bathroom. Otherwise none of the witnesses would have chosen to go to the hospital for their treatment leaving the dead body of Shivaji in the bathroom. Conversely the fact that they did not know that Shivaji's dead body was in the bathroom cannot be the ground to discard the evidence of witnesses who had deposed that they had seen Shivaji being assaulted and then running away from the scene simply because due to the recovery of the dead body from the bathroom they had said that they saw Shivaji running towards

bathroom or cattle shed. Since Shivaji was the centre of the entire episode on whom the assault began at the time of incident and it was he who was earlier man-handled by the accused when his banian was torn and his mother had rescued him and brought him to the house it cannot be said that Shivaji must have been assaulted and murdered somewhere else by some other persons. The defence advocate boldly argued that he must have been assaulted by Shivaji More and Tanaji More who are the brothers of accused no.6 Pralhad More who were involved in the earlier assault on Shivaji at about 5 p.m. in respect of which Shivaji More had lodged complaint against the deceased as well as other prosecution witnesses. It is not new thing that accused very often go and lodge complaint at the police station even before the relations of the deceased can have recourse to medical aid or the police help. It is pertinent to point out that in respect of the alleged assault by the deceased neither accused no.6 nor his brother who had lodged that complaint was injured. One cannot be oblivious to the fact that Shivaji More and Tanaji More who had lodged the complaint of assault against the deceased Shivaji and the other prosecution witnesses in respect of the incident which took place at about 5 p.m. at Jotiba Temple near the residence of the complainant are none

other than the real brothers of accused no.6 in this case who had been attributed role by the witnesses. Even assuming that the complaint of Shivaji More and Tanaji More of assault against deceased Shivaji and others was true, there is no reason or material to draw the inference that Shivaji may have been murdered by the two brothers Tanaji and Shivaji More as boldly asserted by the defence advocate in this court.

32. Moreover, the presence of the mob near the house of the complainant cannot explain the injuries on the persons of the deceased Shivaji and the prosecution witnesses. The pelting of the stones was on the house of the deceased and even if the stones had been pelted on the prosecution witnesses and the deceased that would not have resulted in the injuries of the type found on the persons of the deceased and the prosecution witnesses. The mob of 50 persons had no reason to assault the deceased Shivaji and the prosecution witnesses. If the stones were pelted on the house of the deceased they must have been pelted by the accused themselves so that Shivaji who was taken inside the house by his mother to rescue him from the possible assault by the accused would come out of his house to enable the accused to assault him.

This is not a case that even benefit of doubt could be given to the accused by holding that the deceased and prosecution witnesses must have received injuries due to mob attack by ignoring the evidence of injured eye witnesses which is corroborated by the medical evidence.

33. The judgment of the Supreme Court was cited before the trial court in the case of Himachal Pradesh Administration vs. Omprakash reported in **(1972) 1 SCC 249**, in which it was held that in order to give benefit of doubt to the accused the doubt must be reasonable. The said view is reiterated by the Supreme Court in the case of Shivaji Sahebrao Bobade vs. State of Maharashtra reported in **(1973) 2 SCC 793**. The Supreme Court has cautioned about the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social justice and to the soothing sentiment which was cited with approval in the recent decision of the Supreme Court in the case of Gangadhar Behera and ors. vs. State of Orissa reported in **(2002) 8 SCC 381**. It was observed that doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. The court should never forget that a

miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent.

34. In the Omprakash’s case the Supreme Court has observed as follows, which is quoted by the trial court when it was brought to it’s notice on behalf of the prosecution:-

> "The benefit of doubt to which the accused is entitled is reasonable doubt - the doubt which rational thinking men will reasonably, honestly, and conscientiously entertain and not the doubt of timid mind which fights shy - though unwittingly it may not be - or is afraid to logical consequences, if that benefit was not given."

Though the judgments of the apex court were cited the trial court was unable to appreciate the ratio of the said decisions and apply the same to the present case.

35. Prosecution had also cited before the trial Judge the decision of the Supreme Court in the case of Sohrab vs. State of Madhypradesh reported in **(1972) 3 SCC 751** in which it has been observed that merely because there have been discrepancies and contradictions in the evidence of the witnesses, the entire evidence of the prosecution cannot be discarded. The judgment of the Supreme Court in the case of Madhusudan and ors. vs. State of Uttarpradesh reported in **(1983) 1 SCC 218** was also cited by the prosecution in support of the contention that improvements or variations made by the witnesses are not sufficient to reject their testimony when parties have long standing enmity and it is prudent to convict those persons whose presence and participation is proved.

36. As regards the murder of Shivaji is concerned, it would be relevant to refer to the judgment of the Supreme Court in the case of Mahadeo Dnyamu Jadav vs. State of Maharashtra reported in **AIR 1976 SC 2327**. In that case four murders had been committed. One witness had seen the murders of two persons only and he had by way of improvement given evidence in the court that he had seen the murders of other two persons as well. It was argued on behalf of the

defence that when the witness had falsely deposed that he had seen the murders of all the four persons though he had actually seen the murders of two persons, he should not be believed even in respect of the commission of two murders seen by him. However, the said contention was rejected by the Supreme Court holding that since four murders were committed at about the same time as a part of the same transaction and by one and the same person and when all the deceased persons had received similar types of injuries and the murders having taken place in quick succession, all the four murders had been committed by the same accused. In this case when deceased Shivaji had received similar injuries as were received by the prosecution witnesses, and the dead body of deceased Shivaji was found at the same place having received injuries at about the same time of the incident alluded to by the prosecution witnesses, it cannot be said that the prosecution witnesses had proved the assault on themselves but not the assault on the deceased.

37. Reliance by the defence Advocate on the judgment of the Supreme Court in the case of Harjinder Singh alias Bhola vs. State of Punjab reported in **AIR 2004 SC 3962** is not proper. In that case Chowkidar

Nahar Singh who had come on the spot after the incident and was guarding the dead body though cited as witness was not examined. The apex court held that the evidence of witness who had come immediately after the occurrence on hearing cries of the eye witnesses would have been valuable to corroborate the account given by the direct witnesses. That was the case where the eye witnesses were chance witnesses and not natural witnesses as in the present case.

38. This is not a case which depends only on the evidence of the eye witnesses. Apart from the fact that the evidence of the eye witnesses, who are natural witnesses, is corroborated by the injuries suffered by them and the medical evidence, there is also recovery evidence. Following morning when the I.O. went to the place of offence and drew inquest panchanama on the dead body and spot panchanama he also took search of the houses of the accused. At that time he recovered a bamboo stick (article 9) from outside the house of accused nos.1,2 and 4. It was lying in the heap of woods. That was found to be blood stained. The same was attached under panchanama Exh.35 dated 19/5/1988 which was drawn at about 10.15 a.m. Though the panch P.W.4 Pramod Marathe had turned hostile that recovery is proved by the I.O. The said

bamboo stick was sent to C.A. for examination and as per the C.A. report dated 31/1/1989 Exh.61 said bamboo stick was found stained with blood of group "O" which according to the said report was also found on the earth collected from the place of the incident and on the clothes of the deceased.

39. After arrest of accused no.2 on 26/5/1988, he volunteered to produce sword and axe on 30/5/1988 from the place where he had hidden them after the incident. They were recovered at the instance of accused no.2 from beneath a Tamarind tree. They are sword (muddemal article no.18) and axe (muddemal article no.19). Though P.W. 5 panch Nivas Pisal and P.W.6 panch Anandrao Dange had turned hostile, the said recovery has been proved by the I.O. Those articles were sent to C.A. for examination and as per the aforesaid C.A. report article no.18 sword was found stained with human blood and article no.19 axe was found stained with blood of group "O" which was also found on the clothes of the deceased.

40. Accused no.5 was arrested on 1/6/1988 and there is recovery made of one axe and one bamboo stick at his instance on 4/6/1988 which were seized under panchanama Exh.40. Here also both the pachas P.W. 7

Sanjay More and P.W.8 Mahadeo More had turned hostile but the said recovery is proved by the I.O. Axe (article no.20) recovered at the instance of accused no.5 was stained with human blood as per the above C.A. report.

41. It is well settled that even if the panchas turn hostile the evidence of Police Officer can be relied on unless it is shown to be unbelievable. No reason is advanced as to why the evidence of I.O. should not be believed with regard to the discovery evidence against the accused, particularly when those articles were stained with either human blood or blood group "O" which was that of the deceased. All the panchas in this case, including the panchas to the spot panchanama, had turned hostile, but that cannot be the ground to discard the evidence of recovery at the instance of the accused persons. In the case of State Government of NCT of Delhi vs. Sunil and anr. reported in **(2201) 1 SCC 652** the Supreme Court has held that evidence of the Police Officer regarding the recovery at the instance of the accused should ordinarily be believed and it is for the accused to show that such evidence is unreliable.

42. The trial court has not considered this

circumstance mainly on the ground that the panchas had turned hostile. The trial court ought to have considered the evidence of I.O. The evidence of I.O. has not been relied in this respect by the trial court on the ground that he had not produced the xerox copy of the statement of P.W.14 Ananda. The copies of statement of P.W. 14 were supplied to the defence and accordingly he was cross examined at length. The I.O. has in his deposition stated that the xerox copy of the statement of P.W.14 was true copy of the original statement recorded by him on 19/5/1988 and the said xerox copy produced by him in the court was bearing his signature also. If for any reason the original statement of P.W. 14 was not produced it cannot be the ground for disbelieving the I.O. even as regards the evidence of recovery of the weapons at the instance of the accused persons which were blood stained. The discovery of blood stained weapons at the instance of accused is a very strong circumstance which corroborates the evidence of eye witnesses and fixes the guilt on the accused. This shows how lightly the trial court has discarded the prosecution evidence and acquitted the accused. The trial court had no justification to hold that it could not be stated beyond reasonable doubt that these accused persons or any of them were members of the unlawful

assembly who had committed offence of rioting and murder of Shivaji.

43. Next circumstance which cannot be ignored is that the accused persons were absconding immediately after the incident in question. The I.O. deposed that on 19/5/1988 about 1 a.m. he proceeded to village Kusur along with other policemen. He searched for the accused persons but nobody was traced. He has further deposed that on 26/5/1988 he succeeded in arresting accused nos.2 Sambhaji and accused no.3 Appaso in Tulsan in Taluka Karad. Obviously the accused were not in their house from the night of the incident until accused nos.2 and 3 were arrested from different village on 26/5/1988 i.e. after a period of eight days. Accused nos.5,6 and 7 were absconding for a period of 13 days from the date of the incident and ultimately surrendered at the police station on 1/6/1988. Accused nos.1 and 4 had obtained anticipatory bail. While accused no.1 had surrendered on 7/7/1988, accused no.4 surrendered on 16/7/1988. Since they had obtained anticipatory bail and surrendered also very late there was no question of any recovery to be made from them. Thus the abscondence of the accused persons since the night of the incident is yet another circumstance which goes

against the accused.

44. The trial court has also not considered the C.A. report against the accused on the ground that the blood sample of accused persons were not taken. Fortunately in this case the trial judge had performed his duty which is neglected by many Sessions Judges to put this circumstance of the discovery as well as the finding of the blood on the weapons recovered at the instance of the accused under Section 27 of the Act to the accused during their examination under Section 313 of Cr.P.C. seeking their explanation. But the accused have not offered any explanation and the only answer given by them is that they do not know about the finding of the blood on those weapons.

45. Apart from the aforesaid evidence, the prosecution has proved the motive. The trial court has held the motive proved but has observed that motive could not be the sole ground for convicting accused, which is correct. But we have found that in this case not only the motive is proved against the accused but the eye witnesses have proved the assault on them and the deceased by the accused persons which is corroborated by the fact that the accused were named immediately by the witnesses and the medical

evidence has corroborated the ocular testimony. There is discovery of blood stained weapons at their instances and the circumstance of disappearance of the accused from the time of the incident.

46. As regards the injuries on the witnesses are concerned the trial court has observed that there was no serious dispute from the side of the accused. But again the benefit of doubt has been given by the trial court to the accused even with regard to the injuries on the witnesses on the ground that the question is whether all the accused persons or any of the accused persons were the authors of the said injuries and the evidence of the eye witnesses not being, according to the trial judge, clinching suffer from reasonable doubt. The trial court has disbelieved the witnesses even as regards the injuries on the witnesses by observing that it appeared that incident might have occurred in the manner as stated by the defence witness Kalavati and it was possible that two More brothers i.e. Tanaji and Shivaji More, who are the real brothers of accused no.6 Pralhad More might have assaulted the wintesses by throwing the stones on the injured and deceased Shivaji and none of the eye witnesses could have seen the accused earlier in that crowd. One can only lament on the view taken by the

trial court in the teeth of the evidence which we have discussed hereinabove. In the case of State of U.P. vs. Dan Singh reported in **(1997) 3 SCC 747** it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. In the case of Lalji vs. State of U.P. reported in **(1989) 1 SCC 437** it was observed in para 9 as follows:

> "While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

47. The defence advocate cited the decision of the Supreme Court in the case of Rajendra Prasad vs. State of Bihar reported in **AIR 1977 SC 1059**, which deals with the power of the High Court to interfere in an appeal against acquittal. In the said case Supreme Court has held that while interfering in the order of acquittal the High Court has to point out in its judgment that the trial court’s reasons are palpably and unerringly shaky and the High Court finds it

impossible for the trial court to reject the testimony of the witnesses. We have given our reasons why the evidence of eye witnesses in this case, who are themselves injured, could not have been disbelieved due to the minor discrepancies. Secondly reliance was placed on the decision of the Division Bench of this Court in the case of State of Maharashtra vs. Haribhau Krishnaji Deshmukh and ors. reported in **2003 Cri.L.J. 3639**. In that case Division Bench of this court has referred to the previous judgments of the Supreme Court and then applied the ratio of those decisions to the case before it. The decisions of the apex court cited therein have laid down that the test suggested by the expression "substantial and compelling reasons" for reversing a judgment of acquittal has not to be construed as a formula which has to be rigidly applied in every case and, therefore, it is not necessary for the High Court to interfere with the findings of the trial court only when the reasons of the trial court are perverse. Secondly it has been observed by the Supreme Court that although the powers of the High Court to reassess the evidence and reach its own conclusion are as extensive as in an appeal against the order of conviction, yet, as a rule of prudence, the High Court should always give proper weight and consideration to

the view of the trial judge as to the credibility of the witnesses and the presumption of innocence in favour of the accused is not weakened due to the acquittal order and the accused have the right of the benefit of any doubt and unless the conclusions of the trial court drawn on the evidence on record are found to be unreasonable, perverse or unsustainable, the High Court should not interfere with the order of acquittal. We have found, as a matter of fact, the reasoning of the trial court is unreasonable, particularly, reasons given for disbelieving the injured eye witnesses and discarding the circumstance of recovery of blood stained weapons.

48. When all the accused have been named by at least three eye witnesses, one having surprisingly turned hostile, it would ‘lead to a cynical disregard of law’ if accused nos. 1 to 6 are acquitted of the offences with which they were charged. As regards accused no.7 no role is attributed and his presence is spoken only by one witness i.e. P.W. 14 and, therefore, we would not go to the extent of setting aside the order of acquittal recorded by the trial court against accused no.7. Accused nos.1 to 6 are guilty both for the offence of rioting and murder of Shivaji Ganpat Deshmukh @ Desai as well as for the

assaults on prosecution witnesses Nos.12, 13 and 14. Since accused nos. 1 to 6 have participated in the assault on all the three eye witnesses, by virtue of Section 149 of IPC they are liable to be convicted for the offences under Sections 326, 325, 324 and 323 of IPC.

49. In the result, the appeal against respondent-original accused no.1 shall stand abated. The appeal is allowed against respondents-original accused nos.2 to 6. The order of acquittal recorded by the trial court against respondents-original accused nos.2 to 6 is set aside and they are convicted as follows:-

. Respondents-original accused nos.2 to 6 are convicted for offence under Section 302 read with Section 149 of IPC and sentenced to RI for life and to pay a fine of Rs.5000/- each in default to suffer further imprisonment for one year.

. Respondents-original accused nos.2 to 6 are also convicted for the offences under Sections 143, 147, 148, 323, 324, 325 and 326 of IPC read with Section 149 of IPC. For the offence under Section 326 read with Section 149 of IPC they are sentenced to RI

for two years and to pay a fine of Rs.2000/- each in default to suffer further imprisonment for six months. In view of the fact that all the offences have been committed during the course of same incident, no separate sentences are being imposed for the other offences. The order of acquittal for offence under Section 307 of IPC is confirmed.

. The substantive sentences shall run concurrently.

. The respondents-original accused nos.2 to 6 shall be entitled for set off under Section 428 of Cr.P.C. for the period during which they were in custody in respect of these offences.

. The respondents-original accused nos.2 to 6 shall surrender to their bail bonds forthwith.

. The appeal as against respondent-original accused no.7 is dismissed. The bail bond of respondent-original accused no.7 shall stand cancelled.

. Out of the amount of fine, when deposited, a sum of Rs.25,000/- shall be paid to the widow of deceased Shivaji Ganpat Desai and in her absence to his children if any otherwise to the parents of the deceased Shivaji Ganpat Desai and in their absence to the other heirs of the deceased except P.W.9.

. The appeal is disposed of accordingly.

(S.S. Parkar, J.)

(Anoop V. Mohta,J.)